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Introducing Efficiency into the 2010 IBA Rules on Evidence: Does this Create a Back Door for Introducing Additional Inefficiencies into the System?

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On May 29, 2010, the International Bar Association adopted a new set of rules on the taking of evidence in arbitral proceedings.[1] The IBA Rules on the Taking of Evidence in International Arbitration (2010 Rules on Evidence) mainly facilitate the taking of Evidence in international arbitration for parties coming from different legal backgrounds. The 2010 Rules on Evidence act as a supplement to other frameworks that parties can choose to use for their arbitration process. A party can be very flexible when adopting the 2010 Rules of Evidence, since they can adopt the rules either in whole or in part at the time of drafting a contract. Several changes have been made to the 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999 Rules on Evidence), such as the removal of the word "commercial" from the title of the document to acknowledge the fact that the rules can be applied in both commercial and investment arbitration. Additionally, changes were made in order to promote a more economic and efficient international arbitral process.[2] With such an objective in mind, the IBA applied several important changes to articles five through nine that are likely to create tension among parties who will consider including these rules in their arbitration agreements.

Article 5: Party Appointed Experts

The newly adopted article five mirrors its predecessor by stating that if a party intends to rely on expert testimony, they must notify the opposing party. Additionally, the rule sets forth the requirements for expert reports.[3] Through the 2010 Rules on Evidence's article 5(3), revised or additional reports or statements can be introduced into evidence by persons who have not been identified as party appointed experts. In this case, the additional reports or statements must respond, "only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration."[4] This clause can lead to last minute submissions of revised or additional reports and statements, which may cause friction between the parties, by possibly resulting in a battle of additional report and statement submissions. Moreover, article 5(4) may be in conflict with article 5(3), given that it states an arbitral tribunal can require experts who have submitted or will submit expert reports to meet and confer on any issue that their reports have in common.[5]

After meeting, the party appointed experts must record in writing on areas that they agree on and those areas on which they do not. Although there is a deadline (to be determined by the arbitral tribunal) for the submission of additional reports or statements, the fact that an arbitral tribunal can order party appointed experts to meet and discuss their reports can be conflicting. Since reports can be submitted up until the deadline established by the arbitral tribunal, this may result in experts involved in a constant back and forth motion every time one of them submits a new or updated report forcing a new meeting among experts. Therefore, adopting both article 5(3) and 5(4) would not only be an ill-advised action, but inefficient and a misuse of funds.

Article 8: The Evidentiary Hearing

In an effort to reduce costs and make the evidentiary hearing process more efficient, the 2010 Rules on Evidence grant the arbitral tribunal the authority to allow the use of videoconferencing or "similar technology" when questioning a witness.[6] This will likely cut down on expenses by avoiding travel costs for the witness. In contrast to the 1999 Rules on Evidence, the 2010 Rules on Evidence have also granted the arbitral tribunal the power to limit or exclude a question, answer, or the appearance of a witness, if it considers the question or presence of the witness irrelevant or immaterial[7]. Although it is clear that the working party — the panel of members of the arbitration committee of the IBA that prepared the Rules on Evidence — was trying to make the process more efficient by eliminating irrelevant or duplicative questions and witnesses, the party submitting the witness can view this as a disadvantage. The benefit of having a "duplicative" witness is that they serve

1 International Bar Association, Arbitration Committee, Updated IBA Rules on the Taking of Evidence in International Arbitration (May 29, 2010), http://www.ibanet.org/LPD/Dispute_Resolution_Section/.
2 *Id*.
3 *Id*. at arts. 5(2)(a) – 5(2)(2).
4 *Id*. at art. 5(3).
5 *Id*. at art. 5(4).
6 *Id*. at art. 8(1).
7 *Id*. at art. 8(2).

to reaffirm what another witness has said, however should the arbitral tribunal decide to exclude the testimony, this could arguably hurt their case. In order to fully view reasons by which an arbitral tribunal may limit any question or answer, or deny the appearance of a witness refer to article 9(2)(a–g).

Article 9: The Admissibility and Assessment of Evidence

Article nine is one of the most important — if not the most important — articles in the 2010 Rules on Evidence, because it lays out how an arbitral tribunal determines what evidence it will consider and how evidence will be assessed. Most importantly, article 9(7) requires that parties act in "good faith" during the evidentiary process, and grants the arbitral tribunal the power to take into account a party's lack of good faith when it awards the costs of the arbitration to the parties.[8] Although this section is well intentioned since it seeks to prevent any type of abuse of the evidentiary process, by not providing a definition of "good faith," the 2010 Rules on Evidence leaves it up to the arbitral tribunal to interpret the meaning of "good faith," thus giving the tribunal wider discretion. Additionally, this section would also open the doors for opposing parties to accuse each other of violating the good faith requirement in order for the opposing party to incur more costs, thus making the process potentially lengthier and more expensive and inefficient. Due to the above, it may be risky for a party to adopt article 9(7) in its arbitration proceeding.

It is evident that several changes have been made, and most of these focus on the need to make the taking of evidence in international arbitration more efficient and economic for the parties involved. This leaves the door open for the abuse of process and may create alternative efficiencies not previously contemplated when drafting these reforms aimed at creating an economic and efficient system. Therefore, it would be wise for a party to go over the 2010 Rules on Evidence and balance their interests when deciding which articles to adopt in their international arbitration proceeding.

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[8] *Id*. at art. 9(7).